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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

07CV 2196 JM ... BLM

CV07-6865 GAR (JTL)

CASE No. D 028430

Jesse Edward Rivas,
Petitioner,

vs.

A. Hedgpeth,
Respondent.

EX-PARTE MOTION FOR
APPOINTMENT OF COUNSEL

DOCKETED ON CA OCT 29 2007 BY <i>[Signature]</i> 057
--

TO THE ABOVE ENTITLED COURT.

Comes now the petitioner in the above entitled action with
this motion for the appointment of counsel to assist the
petitioner in further litigation of this action.

petitioner's motion is based on the following facts and the
particular authorities cited herein after, as well as the
exhibits and transcripts currently on the file in this
matter. Petitioner's motion is additionally based on the
attached declaration, exhibits, and argument.

3

MEMORANDUM OF POINT AND AUTHORITIES
INTRODUCTION PETITIONER SEEKING TO
WITHDRAW HIS PLEA OF NOLO CONTENDRE

Petitioner seeks permission to withdraw his plea of nolo contendre. In accepting the ple, petitioner followed the

advice of his counsel, KARSTEN BOONE. Petitioner contends that both counsel's advise and performance fell below an objective standard of reasonableness and by counsel's error he would not have plead guilty and would have insisted on going to trial. Procedurally a plea of nolo contendre is treated like a plea of guilty. California Penal Code §101(3).

Although the court loses it's statutory authority to permit a defendant to withdraw his guilty plea after judgment is entered both a motion to vacate and petition in nature of Coram Bobis, and Habeas Corpus, raising constitutional issues may be considered by the court. (People v. Stansworth, (1974) 11 Cal.3d 588), therefore this petition for writ of habeas corpus is the appropriate vehicle for petition to use to seek permission to withdraw his plea of nolo contendre.

ARGUMENT I.

The cumulative effect of trial counsel's failure to adequately investigate constitutes ineffective assistance of counsel which rendered petitioner's plea of nolo contendre unknowing and involuntarily made. Every person accused of a crime is entitled

1 to constitutionally adequate legal assistance consisting of the
2 service of a reasonably competent attorney acting as a diligent
3 conscientious advocate, (People v. Pope (1979) 23 Cal. 412, 427;
4 15 Cal. Rptr. 732.) The right to adequate assistance of counsel

5 is grounded in the United States Constitution, Sixth Amendment,
6 and Article I, § 15, of the California Constitution, (People
7 v. Nation (1980) 26 Cal. 3d 169, 178; 161 Cal. Rptr. 299.)

8
9 The pleading and plea bargain stage of a criminal proceeding
10 is a critical stage in the criminal process at which a defendant
11 is entitled to effective assistance of counsel guaranteed by
12 the Federal and State Constitution. (In re Alvernaz (1992) 2
13 Cal. 4th 924, 927; 8 Cal. Rptr. 2d 713; Hill v. Lockhart (1985)
14 474 U.S. 52; 106 S.Ct. 366; 88 L.Ed. 2d 203.)

15
16 It is well settled that where ineffective assistance of counsel
17 results in the defendant's decision to plea guilty, the defendant
18 has suffered the constitutional violation giving rise to a claim
19 for relief from the guilty plea, (Id. 2 Cal. 4th @ 934.)

20
21 The United States Supreme Court in Lockhart, supra held that
22 the two part (Strickland v. Washington (1984) 466 U.S. 668, 667;
23 106 S.Ct. 2052; 80 L.Ed. 2d 674) test applies to challenges of
24 counsel. The Lockhart court found in the plea bargaining context,
25 a petitioner seeking to establish ineffective assistance of
26 counsel must demonstrate that:

1 (1) Counsel's advice and performance fell below an objective
2 standard of reasonableness; and

3
4 (2) The petitioner must show that there is a reasonable
5 probability that but for counsel's errors, he would not have
6 plead guilty and would have insisted on going to trial. (Id.
7 474 U.S. @ 59.)

8
9 The Lockhart court further explained that in many guilty plea
10 cases the prejudice inquiry will closely resemble the inquiry
11 engaged in by courts reviewing ineffective assistance challenge
12 to convictions obtained through a trial for example where the
13 alleged errors of counsel is a failure to investigate or discover
14 potentially exculpatory evidence. The determination whether the
15 error prejudiced the defendant by causing him to plea guilty
16 rather than go to trial will depend on the likelihood that
17 discovery of the evidence would have led counsel to change his
18 recommendation as to the plea (Id.)

19
20 In the instant case, Petitioner submits counsel's performance
21 fell below an objective standard of reasonableness when counsel
22 failed to investigate facts, which any attorney acting as diligent
23 conscientious advocate would have performed. Petitioner further
24 submits that had counsel investigated these facts there is a
25 reasonable likely hood that counsel would have recommended
26 pleading not guilty and going to trial.

1 transcripts currently on file in this additionally based on the
2 attached declaration, Exhibits, and argument.

3
4
5 The cumulative effect of trial counsel failure to adequately
6 investigate by the constitute's ineffectve assistance of counsel
7 which is rendered, Petitioner's plea of no contender unknowing and
8 unvoluntarily made, but with all due respect, every person that is
9 accused of a crime is entitled to constitutionally adequate legal
10 assistance consisting of the service a reasonably competent by the
11 Attorney acting as a diligent conscientious advocate, People v.
12 Pope, (1979) 23 Cal.3d 412, 427 [590 P.2d 859, 15 Cal.Rptr. 732].

13
14 The right to adequate assistance of counsel is ground in the
15 United States Constitution by the Sixth Amendment and Article I,
16 section 15 of the California Constitution, People v. Nation,
17 (1980) 26 Cal.3d 169, 178 [604 P.2d 1051, 161 Cal.Rptr. 299].

18
19 The pleading and plea bargain stage of a criminal proceeding is
20 a critical stage in the criminal process at which the defendant is
21 entitled to the effective assistance of a counsel to guaranteed by
22 the Federal and the State of California Constitution, In re
23 Alvernaz, (1992) 2 Cal.4th 924, 972 [80 P.3d 747, 8 Cal.Rptr.2d
24 713], see also Hill v. Lockhart, (1985) 474 US 52, 88 L.Ed 2d 203,
25 106 S.Ct 366.

26
27 It is well settled that where ineffective assistance of counsel
28 result in the defendant decision to plea guilty, the defendant has

1 right to Counsel to be assigned to assist in pursuing his claim
2 of constitutional violations before the Courts, rather the
3 questions of whether or not to assign a Counsel to the rest's in
4 the discretion of the court, and such discretion requires that
5 Counsel be appointed at least in some case (see United States v.
6 Wilkins, 338 F.2d 404) to his or her client, should always
7 included effort to secure information in the prosecution and law
8 enforcement authorities. The duty to investigate exist regardless
9 of the accused's admissions or statement to the lawyer of the
10 facts constitution guilt, (Id., at 1255 quoting [A.B.A. standard
11 4-4. 2d Ed., further A.B.A. standard 4-4(a) states: As soon as
12 practicable the Lawyer should seek to determine all relevant
13 facts known to the accused. In doing so, the Lawyer should probe
14 for all legally relevant information without seeking to
15 influence's the client's responses. An doing so adequate that
16 cannot be framed if the Lawyer does not know what is likely to be
17 develope at trial. In criminal litigation, as in other matter .
18 information is the key guide to discussions and actions the
19 lawyer who is ignorant of the facts of the case cannot serve the
20 client effectively. In the instant case Petitioner submits
21 Counsel performance fell below an objective standard on reasona-
22 -bleness when Counsel failed to investigate the facts, which any
23 Attorney acting as diligent-conscientious advocate would have
24 performed, Petitioner further submit that had Counsel investigated
25 these facts there is a reasonable likely-hood that Counsel would
26 have recommended pleading not guilty and allow the Petitioner to
27 have a fair trial. Based on the following facts and the particular
28 authorities cited herein after, as well as the Exhibits and

1 relief from the guilty plea, (Id., 2 Cal.4th at p. 934) also see
2 Hill v. Lockhart, supra, The United States Supreme Court in Hill
3 v. Lockhart, supra; Held that the two-part, (Strickland v
4 Washington, (1984) 466 US 668, 667-88, 694, 80 L.Ed 2d 674, 106
5 S.Ct 2052) test applies to challenges of counsel, which the Hill
6 Court found. A third edition was publish in the instant case due
7 to the incarceration, however the Blodgett Court opened that the
8 Third edition, is not significantly different from the second
9 edition, (Id., at 1254 and the (ABA)), state's the duty as
10 follow's: It's the duty of the Lawyer to conduct an a examination
11 of the circumstance's of the case and to explore all avenue's that
12 will do leading to the fact's, relevant to the merit's of the case
13 and the penalty in the event of a conviction.

14
15 The investigation should always included the effort to secure
16 the information in the prosecution and Law Authorities. The duty
17 to investigate exist regardless of accusation admission or
18 statement to the Lawyer of the fact's a constitution guilt. The
19 Blodgett Court also discussed an objection norn of Attorney
20 performance under prevalling professional standard, at the time of
21 the case, using by the United States of America Constitution Bar
22 association (A.B.A.) standard's for criminal justice (2nd Ed. (19
23 80). A third edition, which was published in the instant case due
24 to the incarceration however the Blodgett Court opened that the
25 edition is not significantly different from the second edition,
26 People v. Pope, (1979) 23 Cal.3d 412, 427, [590 P.2d 859, 15 Cal.
27 Rptr. 732].

1 The right to adequate assistance of counsel is grounded in the
2 United States Constitution by the Sixth Amendment and (Article
3 v. Nation (1980) 26 Cal. 3d 169, 178; 161 Cal. Rptr. 299.)

4
5 The numerous and substantial errors in this case warrants granting
6 of the petition for writ of habeas corpus, since petitioner was
7 deprived of the constitutional rights by the cumulative effect
8 of all the deprived errors state that might not be prejudicial
9 as the amount to deprivation of due process when setting that's
10 a fundamentally unfair.

11
12 (Cooper v. Showalter 837 F.2d 284 (6th Cir 1988); Lincoln v.
13 Sunn 807 F.2d 805 (9th Cir 1987); Mazies v. Prounfer 743 F.2d
14 281.)

15
16 In this case at hand, the petitioner was denied the Sixth and
17 Fourteenth Amendment right's by due process and a fair trial,
18 based on a relevant prejudicial evidence, and effective assistance
19 of trial counsel for his conviction should be reversed.

20
21 The Blodgett case set out an ideal model of counsel's duties
22 regarding investigation is the defendant's rights to reasonable
23 competent counsel the principle is so fundamental that the failure
24 to conduct a reasonable pretrial investigation may in itself
25 amount to ineffective assistance of counsel, (Blodgett, supra.
26 @ 1255, quoting United States v. Tucker (9th Cir. 1983) 716 F.2d

27 576, 583 n. 16.)

(A) TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE

Before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy tactics founded upon adequate investigation and preparation, (In re Fields, (1990) 51 Cal.3d 1063, 1069; 257 Cal.Rptr. 384; People v. Ledesma, (1987) 43 Cal.3d 171, 215; 23 Cal.Rptr. 404). The client's initial insistence on one defense and opposition to all other does not excuse counsel from under taking sufficient investigation of possible defenses to enable counsel to present an informal report and recommendation to his client, (People v. Mazingo, (1983) 34 Cal.3d 926, 934; 196 Cal.Rptr. 212). Even if counsel has legitimate tactical reasons for introducing no evidence his performance, is still inadequate if evidence supporting a potentially meritorious defense remains unexplored. (Id.).

In the instant case there is no evidence that Detective ALFRED RUSHING did any type of investigation at all there are no notes pertaining to counsels' himself nor is there an indication that he employed the service of a private investigator.

In Harris by through Ramseyer v. Wood, (9th Cir. 1995) 64 F.3d 1432, the Ninth Circuit Court of Appeals upheld the findings of the District Court concerning counsels' failure to adequately investigate in Harris by and through Ramseyer v. Blogett, (W.D. Wash. 1994) F.Supp. 1239, 1255-56; People

1 The right's to adequate assistance of counsel is grounded in
2 the United States Constitution by the Sixth Amendment and Article
3 I, section 15, California Constitution, People v. Nation, (1980)
4 26 Cal.3d 169, 178, [604 P.2d 1051, 161 Cal.Rptr. 299].

5
6 The numerous and substantial errors in this case warrants
7 granting of the petition for writ of habeas corpus, since the
8 Petitioner was deprived of the constitutional right's by the
9 cumulative effect of all the deprived error's state that might
10 not be prejudicial as the amount to deprivation of due process
11 when setting that's a fundamentally unfair, Cooper v. Showalter,
12 (6th Cir. 1988) 837 F.2d 284, Lincoln v. Sunn, (9th Cir. 1987)
13 807 F.2d 805, and Mazies v. Prounier, 743 F.2d 281.

14
15 In this case at hand's, the Petitioner was denied his Sixth
16 and Fourteenth Amendment rights by due process and a fair trial,
17 based on a relevant prejudicial evidence, and the effective
18 assistance of a trial counsel, therefore his conviction should be
19 reversed.

20
21 The appointment or assignment of counsel, (see Taylor v.
22 Pegelon, 335 F.2d 147). Moreover at least one Federal Court has
23 viewed in the context of civil action that, unless the Petition
24 could be summary dismissed an attorney should be assigned to the
25 impoverish Layman prisoner, (see Cullings v. Crouse, 348 F.2d
26 887).

27
28 In Petitioner case as the facts state in the motion for counsel

1 The Blodgett court also discussed an objection standard of
2 attorney performance under prevailing professional norm, at the
3 time of the case using the American Bar Associations (ABA)
4 standards for criminal justice (2d Edition 1980). A third edition
5 which was published in the instant case due to incarceration
6 however the Blodgett court opened that the third edition is not
7 significantly different from the second edition (Id. @ 1254.)
8 The ABA states the duty as follows:

9
10 It is the duty of the lawyer to conduct a examination of the
11 circumstances of the case and to explore all avenues leading
12 to facts relevant to the merits of the case and penalty in
13 the event of conviction. The investigation should always
14 include effort to secure information in the prosecution and
15 law enforcement authorities.

16
17 The duty to investigate exists regardless of the accused
18 admissions or statement to the lawyers of facts constituting
19 guilt. (Id. at 1255, quoting ABA standard 4-4.1 2d Ed.) Further
20 ABA standard 4-3.2(a) states:

21 As soon as practicable, the lawyer should seek to determine
22 all relevant facts known to the accused. In doing so the lawyer
23 should probe for all legally relevant information without
24 seeking to influence the client's responses.

25
26 The commentary to this standard states:

1 Rivas sentence accordingly. (People v. Anderson, supra, 70 Cal.2d at 23;
2 People v. Rowland, supra, 134 Cal.App.3d at 10).

4 II

5 THE PROSECUTOR MISSTATED THE
6 ~~LAW REGARDING THE PROSECUTION'S~~
7 BURDEN OF PROOF BEYOND A
8 REASONABLE DOUBT, EFFECTIVELY
9 REDUCING THE BURDEN OF PROOF

10 During Rivas closing argument, the prosecutor attempted to explain the
11 concept of "reasonable doubt." After reading the second paragraph of
12 CALJIC 2.90, she elaborated as follows:

13
14 That's what reasonable doubt is. It is not any doubt. It is not
15 possible doubt, because you could convict and still have doubt.
16 It is that doubt is reasonable, that you don't feel an abiding
17 conviction for the truth. It is a gut feeling, using your common
18 sense. It is evaluating all the evidence. Is it possible? Of course
19 it is possible. But is it reasonable? Because you all have been
20 selected as jurors because you are reasonable people. The
21 standard is not the action of a person in the defendant's shoes.
22 It is not whether the defendant acted reasonably based on his
23 lifestyle, his own lifestyle. It is a reasonable person standard.
24 That's you guys. And were the actions that the defendant did on
25 October 9, 1995, reasonable? Reasonable? I ask you
26 throughout the course of closing arguments to keep focused on
27 what is reasonable, not possible, reasonable. (3RT 557).

28 The prosecutor's attempt to explain the concept of reasonable doubt
29 diluted the constitutional standard of proof beyond a reasonable doubt
30 and impermissibly told the jury they could convict based on lesser proof.

31 The prosecutor's misstatement of the law on this critical issue requires reversal

1 A prosecutor engages in misconduct when he or she uses "deceptive or
2 reprehensible methods to attempt to persuade either the court or the
3 jury" (People V. Strickland (1974) 11 Cal.3d 946, 955) or engages
4 in a pattern of conduct which renders the trial fundamentally unfair.
5 (People V. Hill (1998) 17 Cal.4th 800, 819). It is not necessary to
6 show the prosecutor acted intentionally or in bad faith. (Id. at 822-
7 823; People V. Bolton (1979) 23 Cal.3d. 208, 213-214). It is misconduct
8 for a prosecutor to misstate the law, especially as it relates to the
9 prosecution's burden of providing guilt beyond a reasonable doubt.
10 (Id. at 829-830; People V. Nguyen (1995) 40 Cal.App.4th 28, 35-36).

11 The Due Process Clause of the Fourteenth Amendment to the United
12 States Constitution "Protects a defendant in a criminal case against
13 conviction" except on proof beyond a reasonable doubt of every fact
14 necessary to constitute the crime with which he is charged. "Jackson
15 V. Virginia, Supra, 443 U.S. at 315, 99S.Ct. at 2787, 61 L.Ed.2d at
16 571, quoting In re Winship (1970) 397 U.S. 358, 364, 90 S.Ct. 1068,
17 1073, 25 L.Ed.2d 368, 375). The reasonable doubt standard serves several
18 functions: it gives substance to the presumption of innocence; it
19 ensures against unjust convictions; and reduces the risk of factual
20 error in criminal cases. (Ibid.; In re Winship, supra, 397 U.S. at
21 363, 90 S.Ct. at 1072, 25 L.Ed.3d at 375). In order to find guilt beyond
22 a reasonable doubt, the trier of fact must " reach a subjective state
23 of near certitude of the guilt of the accused." (Ibid.).

24 Both Prosecutorial arguments and jury instructions which dilute or
25 diminish the prosecution's burden of proof to something less than beyond
26 a reasonable doubt are improper. (People V. Nguyen, supra, 40 Cal.
27 App.4th 28 (Nguyen) [argument]; People V. Johnson (2004) 115 Cal.App.4th

[instruction]]. In Nguyen, for example, the prosecutor suggested the reasonable doubt standard is applied in everyday life, in making decisions such as marrying and changing lanes while driving. (Id. at 36). The Court of Appeal concluded such an argument trivialized the reasonable doubt standard, reducing it to the lesser preponderance of the evidence standard. (Ibid.; People V. Johnson, supra, 115 Cal.App.4th at 1171-1172 [disapproving similar instruction]).

Similarly, in Garcia, the trial court gave the following supplemental instruction purporting to explain the concept of reasonable doubt:

In other words, reasonable doubt means just what the term implies, doubt based upon reason, doubt that presents itself in the minds of reasonable people who are weighing the evidence in scales, one side against the other, in a logical manner other, in a logical manner in an effort to determine wherein lies the truth. (Id. at 68).

The Court of Appeal found supplemental instruction "strikingly similar" to the preponderance of the evidence standard applicable in civil cases and calculated to divert the jury from its duty to find guilt unless they were "reasonably persuaded to a near certainty." (Id. at 69).

For these reasons, the court concluded the supplemental instruction impermissibly watered down the constitutional requirement of proof beyond a reasonable doubt and should not have been given. (Ibid.).

The prosecutor's argument here has the same flaws as the argument and instruction in Nguyen and Garcia. First, the prosecutor improperly told the jury they could decide the case based on a "gut feeling" and "common sense". (3 RT 557). By equating reasonable doubt with "gut feeling" and "common sense," the prosecutor told the jury, in effect, they could apply the same standard they use in making everyday decisions. That standard, however, is the preponderance of the evidence

1 standard, not beyond a reasonable doubt: The judgment of a reasonable
2 man in the ordinary affairs of life, however, important, is influenced
3 and controlled by the preponderance of evidence. Juries are permitted
4 and instructed to apply the same rule to the determination of civil
5 actions involving rights of property only. But in the decision of
6 a criminal case involving life or liberty, something further is
7 required. (People V. Brannon (1883) 47 Cal. 96,97).

8 A decision based on "common sense" or "a gut feeling" does not meet
9 the high standard of near certainty required for a finding of guilt
10 in a criminal case.

Compounding the error, the prosecution told the jury they had been selected as jurors because they are reasonable people, and the standard to be applied is that of a reasonable person. (3 RT 557). Like the prosecutor's appeal to "common sense" and "gut feeling[s]," the invocation of the "reasonable person" standard invoked everyday decision-making not subject to the beyond-a-reasonable-doubt standard. Moreover, the prosecutor's reliance on the reasonable person standard impermissibly invited the jury to determine guilt based on whether they, as reasonable people, reasonably believed the defendant guilty-a far lower standard than beyond a reasonable doubt.

Finally, the prosecutor incorrectly told the jury that their determination of reasonable doubt was somehow connected to whether they found Rivas had acted reasonably at the time of the car jacking and kidnapping. (3 RT 557). Even assuming arguendo the reasonableness of Rivas beliefs and actions had some bearing on some issues in the case, it is not relevant to the concept of proof beyond a reasonable doubt. The prosecutor's injecting this concept into her discussion of the prosecution's burden of proof beyond a reasonable doubt could only have confused and misled the jury about their duty to find guilty to a near certainty.

The prosecutor's improper argument deprived Rivas of his right to a jury determination of guilty beyond a reasonable doubt, and thus deprived him of his rights to due process of law and jury trial. (Victor v. Nebraska (1994) 511 U.S. 1, 14-15, 114 S.Ct. 1239, 1247, 127 L.Ed.2d 583, 595-596). This type of error is a structural defect which requires reversal, because a defendant is entitled to have the jury, not a reviewing court, apply a correct reasonable doubt standard in determining the issue of guilt. (Sullivan v. Louisiana (1993) 508 U.S. 275, 281-282,

113 S.Ct. 2078, 2081, 124 L.Ed.2d 182, 189).

2 Alternatively, reversal is required unless the state can prove beyond
3 a reasonable doubt that the error did not contribute to the verdict.
4 (Chapman v California (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.
5 2d 705, People v. Bolto, supra, 23 Cal.3d 214-215, fn. 4). The prosecution
6 cannot meet that burden in this case. The jury convicted Rivas of
7 carjacking and kidnapping, but as discussed in section I, above, the
8 evidence was not sufficient to support this finding beyond a reasonable
9 doubt. The prosecutor's dilution of the burden of proof surely
10 contributed to the jury's finding based on insufficient evidence. In
11 addition, the jury instruction correctly defining beyond a reasonable
12 doubt (CALJIC 2.90; CT 150) did not cure the harm cause by the improper
13 argument. The prosecutor's argument purported to "explain" the court's
14 instruction, and the jurors had no reason to believe the prosecutor's
15 characterization of "reasonable doubt" was inconsistent with the court's
16 instruction. For this reason, the prosecutor's misstatement of the law
17 regarding proof beyond a reasonable doubt cannot be deemed harmless
18 beyond a reasonable doubt.

19 As a general rule, claims of prosecutorial misconduct may not be
20 raised on appeal, unless the defendant has made a timely objection and
21 requested the jury be admonished. (People v. Hill, supra, 17 Cal.4th at
22 820). However, the issue is not forfeited if an objection would have
23 been futile, or an admonition would not have been effective to cure the
24 harm caused by the misconduct. (Ibid.).

5 Here Rivas attorney did not object to the prosecutor's misstatements
6 of law regarding the concept of reasonable doubt. (3 RT 557). However, it
7 is unlikely an admonition to the jury would have been effective to cure

8 the harm. At most, the trial court likely would have directed the jurors

1 to be guided by the court's instructions, specifically, CALJIC 2.90.

2 However, the prosecutor's argument purported to explain the instruction's
3 definition of reasonable doubt, and the jurors, as lay persons, could not
4 reasonably be expected to know the argument was inconsistent with the law
5 as stated in the court's instructions. For these reasons, a simple

6 admonition to follow the court's instructions would not be effective in
7 preventing the jury from applying the prosecutor's misstatements of law
8 in determining whether the prosecution had sustained its burden of
9 proving Rivas guilty beyond a reasonable doubt.

10 If, arguendo, an objection and request for admonition were required to
11 preserve the issue of prosecutorial misconduct, Rivas attorney's failure
12 to object and request an admonition deprived him of the effective
13 assistance of counsel.

14 A criminal defendant's right to the effective assistance of counsel is
15 based upon the constitutional right to counsel, guaranteed by the Sixth
16 Amendment to the United States Constitution and by Article I, section 15
17 of the California Constitution. (People v. Pope (1979) 23 Cal.3d 412, 422
18 disapproved on other grounds in People v. Berryman (1993) 6 Cal.4th 1048,
19 1081, fn. 10). Effective assistance of counsel requires that the attorney
20 act "in a manner to be expected of reasonably competent attorney acting
21 as diligent advocates." (Id. at 425; In re Jones (1996) 13 Cal.4th 552,
22 566).

23 To establish ineffective assistance of counsel, a defendant must show
24 that (1) counsel's representation fell below an objective standard of
25 reasonableness under prevailing professional norms, and (2) counsel's
26 deficient performance was prejudicial, i.e., there is a reasonable
27 probability that, but for counsel's failings, the result would have been
28 more favorable to the defendant. (People v. Scott (1997) 15 Cal.4th 1188,

1 Wilson (1992) 3 Cal.4th 945,950). " A reasonable probability is a
2 probability sufficient to undermine confidence in the outcome."
3 (Strickland V. Washington (1984) 466 U.S.668,694,104 S.Ct.2052,2068,
4 80 L.Ed.2d 674; In re Jones, supra, 13 Cal.4th at 583). Where there
5 can be no satisfactory explanation for counsel's act or omission.

6 the claim of ineffective assistance of counsel may be raised on direct
7 appeal. (People V. Pope, supra, 23 Cal.3d at 426 People V. Nation
8 (1980) 26 Cal.3d 169, 179 [failure to object to suggestive pretrial
9 identification], People V.Torres (1995) 33 Cal.App.4th 37, 48 [failure
10 to object to improper opinion testimony], People V. McCary (1984)
11 166 Cal.App.3d 1,12 [failure to research inapplicable enhancement
12 before advising defendant to plead guilty]).

13 If, arguendo, counsel was required to object to the prosecutor's
14 improper argument, counsel did not meet the standard of reasonably
15 competent representation when he failed to object to it. The record
16 does not reveal counsel's reasons for the failure to object, but this
17 omission cannot reasonably be explained as a tactical decision or
18 a matter of trial strategy. The prosecution's burden of proof and
19 the requirement of proof beyond a reasonable doubt were crucial legal
20 concepts in this case, as in all criminal prosecutions. Yet defense
21 counsel inexplicably failed to object to and seek to correct the
22 prosecutor's argument diluting the burden of proof. Such an
23
24
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26
27
28

omission can not characterized as "an informed tactical choice WITH IN THE
RANGE OF REASONABLE COMPETENCE."
(People v. Pope, supra, 23 Cal.3d at 425-426). For these reasons,
counsel's failure to object to the prosecutor's improper argument
deprived the defendant (Jesse Edward Rivas) of the effective an
assistance of counsel.

COUNCLUSION

For the reasons stated above, appellant Jesse Edward Rivas
respectfully request's the court reverse or modify the judgment.

Dated: 8.16.07

Respectfully submitted

Jesse Rivas

CERTIFICATE OF WORD'S COUNT

I certify that the length of foregoing APPELLANT'S as determined by the word count feature of my word's processing in program, is

Dated: 8-16-07

Jesse Rivas

~~MEMORANDUM OF POINTS AND AUTHORITIES~~
~~IN SUPPORT OF APPOINTMENT OF COUNSEL.~~

Petitioner respectfully points out that there is clearly statutory authority by which this court may appoint or assign counsel to assist petitioner in the further litigation of this matter, (Title 28 USC § 360(a)-(g)) in some relationship to (Title 28 USC § 2254, also see Norris v. Wainwright, 588 F.2d 130, cert. denied 444 US 846).

One consideration is that of the right of every litigant, rich and poor to equal consideration before the court, (Coppedge v. United States, 395 US 438, 456). Moreover, even without the statutes, there has been some indication that State and Federal courts in the proper situation or case may assist or appoint counsel for an indigent state prisoner under the courts supervisory powers and sound discretion, (McNabb v. United States, 318 US 332, see also the supervisory of Federal Courts 76 Harv. Law Rev. 1656).

Petitioner concedes that some courts have held that counsel is not necessary unless the circumstances of the particular case are such that counsel would be vital to attain due process or access to the Courts, (see, Eskridge v. Rhay, 245 F.2d 778, Anderson v. Heiner, 258 F.2d 778, Dillion v. United States Congress, 207 F.2d 447, Bound v. Smith, (1976) 430 US 817, 97 S.Ct 1491).

Petitioner is aware that the United States Supreme Court and

~~28~~ ~~has held that a litigant has a~~

1 access to the courts, (Eskridge v. Rhay 245 F.2d 778; Anderson
2 v. Heiner 258 F.2d 778; Dillon v. United States 207 F.2d 447;
3 Bounds v. Smith 430 U.S. 817.) Petitioner is aware that the United
4 States Supreme court, and United States Congress have never held
5 that a litigant has a right to counsel to be assigned to assist
6 him in pursuing his claim of constitutional violations before
7 the courts, rather the questions of whether or not to assign
8 counsel rest's in the discretion of the court, and such discretion
9 requires that counsel be appointed at least in some cases, (United
10 States v. Wilkens 338 F.2d 404.) Petitioner contends that there
11 are many entanglements that may be avoided by the lawyer who is
12 ignorant of the facts of the case cannot serve the client
13 effectively.

14
15 Petitioner is a state prisoner proceeding pro-se with a petition
16 for writ of habeas corpus before the court of justice. The
17 petitioner is currently incarcerated at the Kern Valley State
18 Prison.

19
20 Petitioner does not currently have a meaningful source of income
21 by which to employ the services of an attorney who would be able
22 to provide an experienced legal advice or skills that needed
23 to pursue the litigation of this case.

24
25 The petitioner is an indigent state prisoner who has only limited
26 access to legal material.
27
28

1 ~~and the attached declaration he has demonstrated that he himself~~
2 cannot proceed further with the Litigation of this action without
3 at least some assistance from someone with the knowledge of the
4 applicable Law, wherefore Plaintiff request that this court
5 assign an attorney to assist him in the furtherance of pursuit of
6 this civil action.

7
8 Date: 8-16-07

9
10 Respectfully Submitted

11 Jesse Rivas
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1 ~~But with all due respect, this matter it should be noted that~~
2 the California Department of Corrections & Rehabilitation
3 does not provide for any sort of legal assistance nor does
4 the prison library provide the necessary legal books.

5
6 ~~The petitioner has a very limited education in civil law.~~

7
8 Petitioner in the past and the present has been forced to
9 enlist the assistance of so called jailhouse lawyers (when
10 one is available) who are acknowledged in civil law to
11 preparing and filing the proper document currently before the
12 court of law and as well this motion for appointment of
13 counsel held me to proceed my right in the court of law.

14
15 Petitioner contends that in the interest of judicial economy
16 and in the interest of justice that this Honorable Court
17 appoint counsel to assist in this matter.

18
19 DATED: 8.16.07

20
21
22
23 Jesse Pines
24 Respectfully Submitted,
25
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27
28

Jesse Edward Rivas
CDCR Number J-90853
K.V.S.P. C-4 222
P. O. Box 5103
Delano, CA. 93216

RE: People v. Jesse Edward Rivas
Court of Appeals Case No. D028430

But with all due regard, to the Court of law and by the GOD we do believe and trusted and whom it may do concern the Justices of the Human-Kind constitutional rights to reveal the truth in the court of law. I do here by humbly ask to the United States District Court of the State of California and to the Federal Supreme Court to review this Appellant Petition of my behalf in the court of laws. The Petition for review asked the court to grant a review the issues to raised in the Court of Appeals.

I do would like to point out that this argument states a lower standard of proof than beyond a reasonable doubt and impermissibly diluted that the prosecution's burden of proof, due to my trial attorney did not object to any comments which I do would like to argue that any objection would not have cured the harm that is caused by improper argument. The cumulative effect of trial counsel failure to adequately investigate by the constitute's ineffective assistance of counsel which is rendered, petitioner's plea of no contender unknowing and involuntarily made; but with all due respect, every person that is acused of a crime is entitled to constitutionally adequate legal assistance consisting if the service a reasonably competent by the attorney acting as diligent conscientious advocate. People v. Pope, (1979) 23 Cal. 412, 427, 15 Cal.Rptr. 732, 590 P.2d 859. The right to adequate assistance of counsel is ground in the United States Constitution by the Sixth Amendment and (Article I § 15) of the California Constitution, People v. Nation, (1980) 26 Cal. 3d 169, 178 [161 Cal.Rptr. 299, 604 P.2d 1051]. The pleading and plea bargain stage of a criminal proceeding is a critical stage in the criminal stage in the criminal process at which the defendant is entitled to the effective assistance of a counsel to guaranteed by the Federal and State of California's Constitution.

Thank you very much for your time and effort.

Dated: 8.16.07

Respectfully Submitted.

Jesse Rivas